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**Rethinking the Role of National Courts  
in European Integration:  
A Political Study of British Judicial Discretion**

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**DEPARTMENT OF LAW**

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# Rethinking the Role of National Courts in European Integration: A Political Study of British Judicial Discretion

Jonathan Golub

## Introduction

Since the early 1980s, there has been an increasing awareness that the European Court of Justice (ECJ) plays a significant role in the process of European integration. Indeed, the supremacy of EC law and the powerful role of the ECJ provide the Community with supranational characteristics which distinguish it from traditional international organisations. It has also become widely recognised that development of the Community's supranational "new legal order"--which has transformed the treaty into a constitution, provided the foundation upon which to build an integrated European economy, and restricted the sovereignty and political autonomy of the member states--relies heavily on the co-operation of national courts and their decision to make preliminary references under the terms of Article 177 of the Treaty.<sup>1</sup> The Court's handling of preliminary references has sometimes led to claims that it exhibits a consistent pro-integration bias and a willingness to pursue its own political agenda.<sup>2</sup>

Despite the political significance of preliminary references within this new legal order, analysis of the ECJ and of member state courts has mostly been confined to legal scholarship, with only a few notable exceptions which explore

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<sup>1</sup>The ECJ described the Community as a "new legal order" in its seminal *Van Gend* ruling. See Case 25/62 [1963] *European Court Reports*. Article 177 allows questions to be referred to the ECJ by national courts which consider a decision on the question necessary in the immediate case. The ECJ may give preliminary rulings on interpretation of the Treaty, and on the legal validity and interpretation of EC actions.

<sup>2</sup>For earlier accounts of the ECJ's role in integration, see Stuart Scheingold, *The Law in Political Integration* (Cambridge: Harvard University Press, 1971); Henry Schermers, "The European Court of Justice: Promoter of European Integration," 22 *American Journal of Comparative Law* 444 (1974). For an extremely critical view of the Court's activities, see Hjalte Rasmussen, *On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policymaking* (Dordrecht: M. Nijhoff, 1986).

the political aspects of judicial activity.<sup>3</sup> A common element in integration studies which do attempt to combine legal and political analysis has been to identify the motives behind ECJ rulings, and to discover incentives which propel judicial co-operation between the ECJ and national courts. These studies usually present a model of judicial co-operation in which national courts play a leading role in European integration by providing the ECJ with frequent preliminary references.

This paper seeks to test the empirical validity of the traditional judicial co-operation model through a case-study of British court activity since 1972. Political scientists frequently label Britain the "awkward partner" in the EC over a range of issues, noting in particular British scepticism of any development which deepens integration. This raises the central question addressed in this paper: whether British judicial activity in preliminary reference cases conforms to the traditional model or, rather, provides further evidence of British resistance to integration.

The paper proceeds as follows. The first section offers a brief overview of the traditional model of judicial co-operation. The second section reviews ECJ instructions to national courts governing the preliminary reference procedure under Article 177. It will be suggested that this procedure, and adherence to ECJ interpretative methods by national courts, raises a number of previously

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<sup>3</sup>See Joseph Weiler, "The Community System: the Dual Character of Supranationalism," 1 *Yearbook of European Law* 267 (1981); Joseph Weiler, "Community, Membership and European Integration: Is the Law Relevant?" 21 *Journal of Common Market Studies* 39 (1983); Joseph Weiler, "The Transformation of Europe," 100 *Yale Law Journal* 2403 (1991); Rasmussen (1986); Mary Volcansek, *Judicial Politics in Europe* (New York: Peter Lang, 1986); Martin Shapiro, "The European Court of Justice," in Alberta Sbragia, ed., *Euro-Politics: Institutions and Policymaking in the New European Community* (Washington, D.C.: Brookings Institution, 1991); Geoffrey Garrett, "International Cooperation and Institutional Choice: The European Community's Internal Market," 46 *International Organisation* 533 (1992); Anne-Marie Burley and Walter Mattli, "Europe Before the Court: A Political Theory of Legal Integration," 47 *International Organisation* 41 (1993).



unexplored political questions. The third section contrasts British judicial traditions with the rules espoused by the ECJ. British interpretative methods will be discussed, as will British rules governing the Article 177 co-operation procedure. Section four presents comparative statistics on the use of Article 177 in various EC member states. The traditional model of judicial co-operation is then tested against empirical evidence. Section five then tests the model on a microlevel by analysing a series of British cases in the field of environmental protection. These cases further illuminate the political issues inherent to the preliminary reference procedure. In light of the statistics and environmental cases, a substantial sixth section discusses the applicability of the traditional model to British judicial activity. It will be argued that constitutional tradition, domestic political pressures and psychological considerations condition British judicial activity, thereby attenuating the integrative impact of the ECJ. Such considerations should be incorporated into a refined model of judicial co-operation.

### **The traditional model**

It is vital to note that the traditional model of co-operation places significant emphasis specifically on the number of Article 177 references which the ECJ receives. This is distinct from a different form of co-operation which also contributes to European integration, namely the application of "sympathetic interpretation" by national courts to national legislation instead of making a preliminary reference. Through sympathetic interpretation, national courts exercise their interpretative discretion and employ a rule of construction which holds that whenever possible, national law should be read as not intending to conflict with Community law. Various authors have examined the role of sympathetic interpretation by UK courts in assimilating Community obligations into national legislation and in achieving uniform application of Community



law.<sup>4</sup> These authors usually survey a selection of diverse national cases in order to assess how receptive British courts are to ECJ doctrine.

But quite apart from sympathetic interpretation, the frequency of references provides an independent measure of the "partnership" between the ECJ and national courts. In his most recent discussion of courts and integration, Weiler goes out of his way to emphasise that each decision to refer to the ECJ strengthens the level of partnership. "When a national court *seeks* the Reference it is, with few exceptions, acknowledging that, at least at face value, Community norms are necessary and govern the dispute."<sup>5</sup> The traditional model thus defines one crucial index of co-operation as the willingness of national courts to make frequent references under Article 177. The ECJ itself has recognised that preliminary references are "an index both of judicial co-operation between the Court of Justice and the national courts of the Member States and of the integration of Community law into national law."<sup>6</sup>

A number of authors, particularly Weiler, have suggested that judicial empowerment explains why national judges actively assist the ECJ in fostering integration.<sup>7</sup> By supplying Article 177 references which the ECJ then uses as

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<sup>4</sup>See Volcansek (1986); Arnall (1989); Jackie Minor, "United Kingdom: Legislation and Case Law in Relation to the Country's EC-Membership," *Assuntos Europeus* 433 (1983); Aidan O'Neill, "The Government of Judges The Impact of the European Court of Justice on the Constitutional Order of the United Kingdom," EUI Working Paper, LAW No. 93/3 (1993) (Florence, EUI). Erika Szyszczak, "Current Survey," 19 *European Law Review* 214 (1994).

<sup>5</sup>Joseph Weiler, "Journey to an Unknown Destination: A Retrospective and Prospective of the European Court of justice in the Arena of Political Integration," 31 *Journal of Common Market Studies* 417 (1993) at 422.

<sup>6</sup>*Synopsis of the Work of the Court of Justice of the European Communities* (Luxembourg: European Court of Justice, 1972), p. 16.

<sup>7</sup>Another obvious factor which explains judicial co-operation is that national courts are charged with upholding the law. Under the terms of the Treaty, as well as under the national legislation implementing the Treaty, rulings of the ECJ become authoritative interpretations of the Treaty which must be upheld by national courts. Weiler suggests that

ammunition with which to advance European integration, the argument goes, national judges experience the personal self-aggrandisement which comes from directly participating in Community-building. In addition, by empowering the judicial branch, national judges take the opportunity to gain partial control over the other decisionmaking institutions--the Commission, Council, and indirectly over national governments themselves. Burley, for example, contends that the Court successfully convinced lower courts to "leapfrog the national judicial hierarchy and work directly with the ECJ."<sup>8</sup> Other authors, including an ECJ Judge, agree that the ECJ required the co-operation of national courts and therefore appealed to their self-interests.<sup>9</sup>

### **ECJ rules for judicial co-operation: Article 177 references**

While the Court relies heavily on member states to supply preliminary references, overuse of Article 177 could result in a flood of frivolous referrals.<sup>10</sup> In an effort to avoid a deluge of unnecessary referrals while simultaneously guaranteeing that Article 177 does not allow national courts sufficient interpretative latitude to circumvent preliminary references entirely, the ECJ has

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judicial inertia from integrationist rulings in the highest courts of a few states made it progressively "more difficult for national courts to resist the trend with any modicum of credibility." The weight of judicial precedent accumulated, forcing even reluctant courts to accept ECJ doctrine. See Weiler, "The Transformation of Europe," p. 2425. Nevertheless, as this paper will suggest, national judges retain substantial discretion to determine what the law actually requires and whether legal precedent exists. This discretion has enormous political significance.

<sup>8</sup>Burley, "Europe Before the Court," p.58.

<sup>9</sup>See G. Frederico Mancini, "The Making of a Constitution for Europe," 26 *Common Market Law Review* 75 (1981); Volcansek (1986); Martin Shapiro, "The European Court of Justice," p.127.

<sup>10</sup>See Anthony Arnall, "The Use and Abuse of Article 177 EEC," 52 *Modern Law Review* 622 (1989).



attempted to guide national judicial discretion inherent to the co-operative referral process.<sup>11</sup>

There are two situations in which a preliminary reference is not necessary. First, in cases where a national judge finds that a clear ECJ precedent exists on an interpretation of Community law. Second, when no precedent exists, but the correct application of Community law is so obvious that no reference is needed. The Court recognised that "the correct application of Community law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved."<sup>12</sup> In the second situation, therefore, the Court has attenuated the obligation of a national judge to make a preliminary reference with the *acte clair* doctrine: "if a provision is unequivocal there is no need to interpret it," and hence no need to refer to the ECJ.<sup>13</sup>

There is a distinct possibility that national judicial discretion arising under the two situations will undermine the uniform interpretation and application of Community law.<sup>14</sup> If national judges employ their discretion and frequently find that ECJ precedent addresses the question of Community law and therefore no reference is required, the "total effect would be a disastrous reduction of the volume of the Court's docket; and, hence, a sizeable reduction in the Court's sole

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<sup>11</sup>The two leading cases which contain the Court's guidance for national judges are *Da Costa en Schaake et al. v. Nederlandse Belastingadministratie*, Joined Cases 28-30/62 [1963] *European Court Reports* 31; *CILFIT v. Ministry of Health*, Case 283/81 [1982] *European Court Reports* 3415. See Frederico Mancini and David Keeling, "From *CILFIT* to *ERT*: the Constitutional Challenge facing the European Court," 11 *Yearbook of European Law* 1 (1991).

<sup>12</sup>Para. 16 of *CILFIT*.

<sup>13</sup>Advocate General Capotorti in *CILFIT*. [1982] *European Court Reports* 3415, 3435.

<sup>14</sup>See Anthony Arnall, "Reflections on Judicial Attitudes at the European Court," 34 *International and Comparative Law Quarterly* 168 (1985); Gerhard Bebr, "The Rambling Ghost of Cohn-Bendit: Acte Clair and the Court of Justice," 20 *Common Market Law Review* 439 (1983).



means of influence and control."<sup>15</sup> Additionally, national judges might adopt a liberal interpretation of the *acte clair* doctrine in cases where no ECJ precedent exists, and take it upon themselves to decide a considerable number of questions concerning Community law.

The frequency of each of these scenarios might depend in part on the propensity of national judges to "strategically" withhold references. Refusal to refer could effectively circumvent what national judges consider undesirable ECJ doctrine by withholding from the ECJ the ability to return an unfavourable ruling. Judges may be inclined to claim that precedent exists, or that they are following *acte clair*, and interpret Community rules in their own way. Strategic use of this discretion provides an avenue for shaping EC law, and examples from British courts will be examined later in this paper. When a British court chooses to interpret by itself an EC directive instead of invoking Article 177, the ECJ is denied ammunition with which to foster EC integration. It is also denied the ability to impose a stringent interpretation of EC law.

Alternatively, the complexity of the *acte clair* doctrine might actually encourage national judges to make more Article 177 references.<sup>16</sup> This possibility is made more likely if judges make strategic use of Article 177 in a manner opposite to the one discussed previously. If in fact a member state is dissatisfied with an ECJ precedent, frequent challenges to settled law, in the form of preliminary rulings, may be an effective recourse. It has been argued forcefully that German and French influence on the Court is a result of frequent

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<sup>15</sup>Hjalte Rasmussen, "The European Court's *Acte Clair* Strategy in *CILFIT*," 9 *European Law Review* 242 (1984), p. 255.

<sup>16</sup>*Ibid.*; Some of the criteria established in *CILFIT* were described by Hodgson, J. as "intimidating to an English judge" in *R. v. Secretary of State for Transport, ex parte Factortame* [1989] 2 *Common Market Law Review* 353. See also Derrick Wyatt and Alan Dashwood, *Wyatt and Dashwood's European Community Law* (London: Sweet and Maxwell, 1993), p.150.

referrals in the early days of the Community.<sup>17</sup> Although the discretion to make frequent referrals has always existed, *acte clair* almost encourages a deluge of references based on linguistic interpretation, ascertainment of Community objectives, and the proper evolution of Community law.

In sum, Article 177 allows national courts to test the bounds of Community law by requesting preliminary references. By using Article 177, British courts contest or influence the interpretation of EC directives. UK courts could also use preliminary references to challenge the Government's interpretation and implementation of EC directives.

British implementation of several environmental directives, particularly the bathing water directive, illustrates the political significance of this scenario. Initially, out of more than 600 British beaches, the Government designated only 27 sites as UK bathing water areas under the terms of the 1976 Bathing Water Directive, with none in Scotland or Ireland. Not even Blackpool was listed as a bathing site. By comparison, France and Italy designated 3000 beaches. In order to justify its tiny number of designated bathing areas, the Government applied a questionable interpretation of key phrases such as where bathing "is tolerated," and even the definition of "bathing."

The trick was to define a bathing beach as one containing more than 1,000 people per kilometre of beach. The government then left it up to individual water authorities to decide how long a stretch of beach to measure at a time, when to count the bathers (would it be a wet Thursday in May or a sunny bank holiday in August?) and so on.<sup>18</sup>

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<sup>17</sup>See P. Dagtaglou, "The English Judges and EC Law," 37 *Cambridge Law Journal* 76 (1978). See also F. Mann, "Britain's Bill of Rights," 94 *Law Quarterly Review* 512 (1978).

<sup>18</sup>Fred Pearce, "Britain's Dirty Beaches," in Edward Goldsmith and Nicholas Hildyard, eds., *Green Britain or Industrial Wasteland* (Cambridge: Polity Press, 1986), p. 210.



In 1993 the ECJ ruled in an Article 169 action that Britain's narrow interpretation of the directive, particularly its omission of Blackpool, violated EC law.<sup>19</sup> If an opportunity had arisen, British preliminary references in this area might have facilitated stronger criticism from the Court and resulted in an adverse judgement much earlier than 1993.

Taken in a positive light, strategic use of Article 177 by national courts is a mechanism actively to influence the course of ECJ doctrine. Taken negatively, it is an attempt to frustrate or block development of unfavourable doctrines. The extent to which lower courts find it necessary to request a preliminary ruling is determined in part by the willingness and ability of national judges to approximate the judicial style of the ECJ. A brief exploration of ECJ judicial methods is therefore useful. The judicial style of British courts and their use of *acte clair* is then considered.

### *Teleological Interpretation*

The main difference between UK and European judges is the understanding that European judges should fill gaps in legislation as opposed to leaving them for the legislature to amend. This can be done either by close textual analysis or teleological interpretation—a result follows either from the meaning of the words, or alternatively from the purpose of the statute. Due in part to the very nature of the Treaty and the central role given to the ECJ, a certain level of active judicial interpretation is expected. Lord Slynn admits that "for the ECJ, the teleological method frequently precedes and conditions the textual method of interpretation."<sup>20</sup> This diagnosis was also supported by Ulrich Everling, another

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<sup>19</sup>Case 56/90, 14 July 1993.

<sup>20</sup>Sir Gordon Slynn, "The Court of Justice of the European Communities," 33 *International and Comparative Law Quarterly* 409 (1984), p. 421. This concept is very similar to the contentious American constitutional doctrine of original intent.



ECJ judge, when he noted that when answering preliminary rulings, "the reply to the abstract question framed by the court making the reference is not infrequently influenced by the result which the Court believes to be correct in the case..."<sup>21</sup> The teleological method underpinned early ECJ decisions leading to direct effect and primacy of EC law.<sup>22</sup> More recently, similar interpretative techniques have been manifest in the Court's handling of human rights doctrine, as well as environmental policy. In each of these areas, the Court has achieved significant integrationist effects in part by applying an expansive treaty interpretation to questions referred by national courts under Article 177.<sup>23</sup>

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<sup>21</sup>Ulrich Everling, "The Court of Justice as a Decisionmaking Authority," 82 *Michigan Law Review* 1294 (1984), p. 1300.

<sup>22</sup>See Trevor Hartley, "Federalism, Courts and Legal Systems: the Emerging Constitution of the European Community," 34 *American Journal of Comparative Law* 229 (1986); For a discussion of how the Court proceeded despite objections by member states, see Eric Stein, "Lawyers, Judges, and the Making of a Transnational Constitution," 75 *American Journal of International Law* 1 (1981).

<sup>23</sup>On teleology and human rights, see Case 11/70 [1970] *European Court Reports* 125; Case 4/73 [1974] *European Court Reports* 491; Case 44/79 [1979] *European Court Reports* 3727. The literature on this point is both extensive and varied. See Henry Schermers, "The European Court of Justice: Promoter of European Integration," 22 *American Journal of Comparative Law* 444 (1974); Michael Akehurst, "The Application of General Principles of Law by the Court of Justice of the EC," 52 *British Yearbook of International Law* 29 (1982); Manfred Daus, "The Protection of Fundamental Rights in the Community Legal Order," 10 *European Law Review* 398 (1985). For more recent accounts of human rights in the European Community, see Gráinne De Búrca, "Fundamental Rights and the Reach of EC Law," 13 *Oxford Journal of Legal Studies* 283 (1993). The ECJ also played an important role in validating environmental measures which lacked specific treaty foundation. The Court's rulings applied teleological interpretation to the preamble, Article 100 and Article 235, but the crucial effect of its rulings was to validate the steady growth of EC environmental action programmes and directives which occurred prior to the Single European Act. The political consensus which was necessary to pass environmental directives was greatly strengthened by the Court's endorsement, and reluctant member states were left without effective legal recourse to policies which might have been outside the legitimate scope of the treaty. See *Commission of the EC v. Italian Republic*, Case 91/79 [1980] *European Court Reports* 1099; Case 240/83 [1985] *European Court Reports* 531; Danish bottle case, *Commission of the EC v. Denmark*, Case 302/86, 2 *European Community Cases* 167 [1989]. See also Ida Koppen, "The role of the European Court of

The rights which arise from Community legislation and which are applied through the new legal order entail restrictions on national sovereignty. National legislatures and executives are no longer entirely free to adopt policies, because they might contravene EC law. National judges are no longer entirely free to function within their own domestic legal context because ECJ precedent and methods constrain their decisions. The difficulty Britain faces reconciling its own legal order and conceptions of sovereignty with those of the Community is considered below.

### **British sovereignty and the role of the judiciary**

The teleological approach endorsed by the Court appeared particularly unusual to British judges whose interpretative methods focus predominantly on close textual readings. When dealing with legislation, the traditional role of the British courts is to give effect faithfully to any and all acts of Parliament. The orthodox view of sovereignty restricts judicial discretion in order to avoid any diminution of legislative power.<sup>24</sup> Parliament has solidified its own position by giving the courts very little to work with in terms of loose wording. Statutes are drafted narrowly, and are not principles that may easily be expanded upon.<sup>25</sup> British courts are never really given the chance to exercise teleological interpretation to the extent that was seen in ECJ cases. British judicial discretion is therefore limited to the different methods of literal interpretation and grammatical construction, although courts inevitably exercise a certain amount of

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Justice," in J.D. Liefierink et al., eds., *European Integration and Environmental Policy* (London: Belhaven Press, 1993).

<sup>24</sup>See J. Mitchell, S. Kuipers and B. Gall, "Constitutional Aspects of the treaty and Legislation Relating to British Membership," 9 *Common Market Law Review* 134 (1972); Colin Turpin, *British Government and the Constitution* (London: Weidenfeld and Nicolson, 1985).

<sup>25</sup>See P.S. Atiyah, *Pragmatism and Theory in English Law* (London: Stevens, 1987), p. 130.



discretion when interpreting a statute.<sup>26</sup> There is no doubt that even the most liberal British interpretation of the proper judicial role would grant British judges *far* less discretion than exists for members of the ECJ.

### *The 1972 European Communities Act*

The passing of the European Communities Act, which marked Britain's accession to the EC, raised fundamental questions about the future role of British courts and their relationship to Parliament. Section 2(1) of the European Communities Act provided that all directly applicable Community laws would be given direct effect in the UK without further Parliamentary action. Section 3(1) established the importance of the ECJ as the ultimate interpreter of the treaty, and mandated that UK courts follow ECJ rulings.

During the accession debates in the Commons, the Government frequently reiterated that membership would not erode parliamentary supremacy, nor would it fundamentally alter the traditional position of British courts within the British constitutional order. The Government needed to convince proponents of membership that Britain would fulfil its obligations as a member state, while simultaneously denying that membership entailed a wholesale abandonment of British constitutional tradition. The Solicitor General reassured opponents of membership by emphasising mechanisms which would guarantee Parliamentary supremacy.<sup>27</sup> In the extreme case, "at the end of the day if repeal, lock, stock, and barrel, was proposed, the ultimate sovereignty of Parliament must remain

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<sup>26</sup>When legislation is quite narrowly or poorly worded, or possibly unjust, the courts have employed principles of natural law and proportionality, and have avoided an overly strict construction of a statute. See Alan Paterson, *The Law Lords* (Basingstoke: Macmillan, 1982); See also Geoffrey Marshall, *Constitutional Theory* (Oxford: Clarendon Press, 1971). Taken too far, such activism risks judicial imperialism: "one man's rightly straightened ruck in the texture of legislation may be another's improperly filled gap" (Marshall, *Constitutional Theory*, p. 89).

<sup>27</sup>Hansard, 13 June 1972, vol. 838, col. 1317.



intact."<sup>28</sup> Short of this, he asserted, "the courts of this country would give effect to" future Parliamentary legislation which sought "expressly to exclude or override Community obligations."<sup>29</sup> But without explicit wording, British courts would try to reconcile conflicting UK and EC legislation by interpreting UK statutes "in accordance with our international obligations. That is a clear convention of our constitution."<sup>30</sup>

Having entered the Community, Britain was bound by a copious body of EC legislation. British courts were charged with interpreting these Community laws to determine their effects on British citizens, and also with delimiting or ignoring them in the case of conflicting subsequent national legislation. Thus a major bulwark of sovereignty, short of repealing membership, was to be a judiciary faithful to Parliamentary will.

### *British Judicial Attitudes Towards Judicial Co-operation with the ECJ*

It is obvious that for a national court to reconcile domestic and EC law requires an authoritative interpretation of EC law. We saw in section one how the ECJ has allowed national judges a certain degree of discretion when they encounter EC law; if ECJ precedent exists, or, under the *acte clair* doctrine, if the correct interpretation of EC law is obvious, they need not make a reference under Article 177. Otherwise, or if they want the European Court to reconsider the issue, they take their authoritative interpretation from the ECJ by means of a preliminary reference.

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<sup>28</sup>Ibid., p.1319.

<sup>29</sup>Ibid., p.1320.

<sup>30</sup>Ibid., p.1321. Sir Geoffrey Howe, then Solicitor General, outlined how this doctrine of "explicit repeal" could coexist with primacy of EC law.

As far as Article 177 is concerned, until recently the leading British case was the 1974 *Bulmer* decision.<sup>31</sup> After acknowledging that the House of Lords has to "bow down" to an ECJ ruling, and must refer the case for preliminary reference if an issue of interpretation arises, Lord Denning went on to strike at the assumptions of the *acte clair* doctrine. In terms of whether or not to make a preliminary reference to the ECJ, Denning was technically correct that in dealing with Article 177 "an English judge can say either 'I consider it necessary,' or 'I do not consider it necessary.' His discretion in that respect is final."<sup>32</sup> But the spirit of ECJ rulings clearly shows that the discretion of trial courts should be used to further legal uniformity. Total discretion allows the possibility of strategic neglect of Article 177--abuse of *acte clair*. Denning left it unclear precisely when an English court should see the issue as "clear and free from doubt".<sup>33</sup>

*Bulmer* recognised that British and ECJ judges will often employ different methods of interpretation. As was mentioned earlier, the ECJ is comfortable giving meaning to vague and imprecise legislation or treaty provisions. Denning noted that in the UK such methods would be a "naked usurpation of legislative function...The gap must remain open until Parliament finds the time to fill it."<sup>34</sup> But Denning did not purport to defend British judicial techniques against the more activist methods adopted by the ECJ. Nor did he try to minimise the divergence between the two methods. His seminal instructions to English courts were as follows:

They must follow the European pattern. No longer must they  
examine the words in meticulous detail. No longer must they

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<sup>31</sup>*Bulmer v. Bollinger* [1974] 3 *Weekly Law Reports* 202.

<sup>32</sup>*Ibid.*

<sup>33</sup>*Ibid.*, p. 213.

<sup>34</sup>*Ibid.*, p. 219.



argue about the precise grammatical sense. They must look to the purpose or intent...They must not confine themselves to the English text. They must consider, if need be, all the authentic texts, of which there are now eight...They must divine the spirit of the Treaty and gain inspiration from it. If they find a gap they must fill it as best they can. They must do what the framers of the instrument would have done if they had thought about it.<sup>35</sup>

Denning's ruling therefore contained contradictory instructions: British courts should not apply teleological interpretation lest they undermine legislative authority, but should follow the European example and apply the intent of the law. In any case, Denning encouraged British courts to take matters into their own hands and to avoid preliminary references.

Whether this represents faithful adherence to the *acte clair* doctrine is open to debate. It is precisely the teleology *exercised only at EC level* which will maintain uniformity between member states. Otherwise *acte clair* becomes an effective way for courts to redefine treaty terms narrowly. Perhaps it is this very danger of fragmenting Community law that has brought criticism down upon Denning for implying that British Courts should exercise their discretion frequently and decide the issues themselves.

Lord Bingham has done much to address the questions left open by Denning. One of the most important cases since *Bulmer* was his 1983 decision in *ApS Samex*, which has since become accepted as the authoritative guide for British judges.<sup>36</sup> Whereas Denning made it very clear that the initial question facing British courts, whether a decision on the question of Community law was necessary to enable judgement, was totally unhindered by ECJ doctrine, Bingham took a more European view of "necessity." Bingham appeared more willing to temper British discretion and defer to the ECJ's transnational wisdom.

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<sup>35</sup>Ibid., p. 216.

<sup>36</sup>*Customs and Excise Commissioners v. ApS Samex* 1 *All England Law Reports* 1042 (1983).

[T]he court should have regard to the advantages enjoyed by the Court of Justice in having an overall view of the Community and its institutions, a detailed knowledge of the Treaties and of much of the subordinate legislation made under them, and an intimate familiarity with functioning of the Community which a national judge denied the collective experience of the Court of Justice could not hope to achieve.<sup>37</sup>

Bingham went so far as to conclude that even if a British judge's interpretation is clear and free from doubt, a reference may be needed because "it has emerged in some past cases that, even where questions have been considered by national courts to be clearly answerable in one sense, they have ultimately been answered by the Court of Justice in another way."<sup>38</sup>

One final point in *ApS Samex* regards Denning's landmark instruction to engage in gap filling and ECJ interpretative methods. This crucial divergence from standard British practice sat uneasily with Bingham, who again hailed the ECJ as the proper repository of such methods.

Sitting as a judge on a national court, asked to decide questions of Community law, I am very conscious of the advantages enjoyed by the Court of Justice. It has a panoramic view of the Community and its institutions...When comparison falls to be made between Community texts in different languages, all texts being equally authentic, the multinational Court of Justice is equipped to carry out the task in a way which no national judge, whatever his linguistic skills, could rival. The interpretation of Community instruments involves very often not the process familiar to common lawyers of laboriously extracting the meaning from words used but the more creative process of supplying flesh to a spare and loosely constructed skeleton. The choice between alternative submissions may turn not on purely legal

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<sup>37</sup>*Ibid.*, p. 1043.

<sup>38</sup>*Ibid.*, p. 1051.



considerations, but on a broader view of what the orderly development of the Community requires.<sup>39</sup>

This is a stark contrast to Denning's admonitions, and admonishes British judges to make frequent preliminary references.

If we recall the ability of national courts to hasten or hinder EC integration through their use of Article 177 and *acte clair*, the significance of these two cases becomes clear. The manner in which national judges exercise their discretion, and the interpretative methods they decide to employ will each affect the pace and effectiveness of integration. The following section therefore examines how British courts have exercised their discretion under Article 177. Based on *Bulmer* we would expect relatively few references from Britain because English judges would do the interpreting themselves, although we would expect to see more frequent British preliminary references after the 1983 instructions in *ApS Samex*.

### Comparative Article 177 activity in EC member states

As this section will reveal, the frequency of preliminary references varies amongst member states. On the face of the statistics presented below, it would appear that for many years Britain distinguished itself as a nation loathe to provide preliminary references, and therefore loathe to engage in judicial co-operation with the ECJ.<sup>40</sup> The traditional model of judicial co-operation fails to explain these statistics.

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<sup>39</sup>*Ibid.*, p. 1055.

<sup>40</sup>Some figures are from *Synopsis of the Work of the Court of Justice of the European Communities* (Luxembourg: European Court of Justice, annual vols. 1972-1983 and 1990, biannual vols. 1984-1989), others were provided by the Court's Legal Data Processing Service. For earlier compilations, see K. Mortelmans, "The Role of Government Representatives in the Proceedings: Statistical Data on the Observations of the Member States in Preliminary Proceedings," in Henry Schermers, Christian Timmermans, Alfred Kellermann and J. Watson, eds., *Article 177 EEC: Experiences and Problems* (The Hague: North-Holland, 1987); Everling, "The Court of Justice".

**FIGURE 1. PRELIMINARY REFERENCES: 1972-1993**

	<u>72</u>	<u>73</u>	<u>74</u>	<u>75</u>	<u>76</u>	<u>77</u>	<u>78</u>	<u>79</u>	<u>80</u>	<u>81</u>	<u>82</u>	<u>83</u>	<u>Total (1972-1983)</u>
Belgium	4	8	5	7	11	16	7	13	14	12	10	9	116
Denmark	--	0	--	1	--	1	3	1	2	1	1	4	14
France	1	4	6	15	8	14	12	18	14	17	39	15	163
Germany	20	37	14	26	28	30	46	33	24	41	36	36	371
Ireland	--	0	--	0	1	2	1	2	3	0	0	2	11
Italy	4	5	4	14	12	7	11	19	19	12	18	7	132
Luxembourg	0	1	0	1	0	0	0	1	0	4	0	0	7
Netherlands	11	6	6	4	14	9	38	11	17	17	21	19	173
UK	--	0	1	1	1	5	5	8	6	5	4	6	42
Total	40	61	36	69	75	84	123	106	99	109	129	98	1029

  

	<u>84</u>	<u>85</u>	<u>86</u>	<u>87</u>	<u>88</u>	<u>89</u>	<u>90</u>	<u>91</u>	<u>92</u>	<u>93</u>	<u>Total (1984-1993)</u>
Belgium	13	13	13	15	32	13	17	19	16	22	173
Denmark	2	0	4	5	4	2	5	2	3	7	34
France	34	45	19	36	37	28	21	29	15	22	286
Germany	38	40	18	32	34	47	34	54	62	57	416
Ireland	1	2	4	4	0	1	4	2	0	1	19
Italy	10	11	5	5	28	10	25	36	22	24	176
Luxembourg	0	6	1	3	2	1	4	2	1	1	21
Netherlands	22	14	16	19	25	18	9	17	17	43	200
UK	9	8	8	9	16	14	12	14	18	12	120
Total	129	139	88	128	178	134	131	175	154	189	1445

Source: *Synopsis of the Work of the Court of Justice*

With only 42 references from 1972-1983, British courts lagged well behind those of other large EC states. Courts in France, Germany, Italy, the Netherlands and even Belgium requested three times as many preliminary references from the ECJ as did British courts. After 1983, the total number of references from British courts continued to lag behind those of other EC states, but increased from previous years and also relative to all other large member states. This would seem to indicate a particularly low level of judicial co-operation between British judges and the ECJ. The relatively small number of Article 177 cases



originating in British courts offered the ECJ minimal opportunity to foster integration. By making more frequent use of preliminary references, judges in other member states were apparently more willing to follow whatever legal interpretation the ECJ handed down. However, there does appear to be a noticeable increase in the number of British Article 177 references after 1983, particularly in the late 1980s, in accordance with the post-*Bulmer* doctrine of *ApS Samex*, discussed in the previous section. Bingham's instructions to British judges, that they defer to ECJ judgement, appear to have generated more references, particularly in the late 1980s.

But the total number of references is only one measure of judicial co-operation. The small number of references from British courts is explained in part by the fact that, compared to courts in other member states, British judges rarely encounter questions of EC law. The following table reveals that, from 1972-1993, British courts decided questions of EC law, with or without referring them to the ECJ, approximately half as often as did foreign courts in other large EC states, and even less frequently than courts in Belgium. The low incidence of EC legal questions may provide further indication of a lack of judicial co-operation between British courts and the ECJ.

**FIGURE 2. DECISIONS IN NATIONAL COURTS ON QUESTIONS OF EC LAW**

	<u>Total National Decisions on EC Law Questions (1972-83)</u>	<u>Total National Decisions on EC Law Questions (1984-93)</u>
Belgium	557	622
Denmark	32	63
France	525	1496
Germany	1429	2205
Ireland	22	88
Italy	452	1074
Luxembourg	35	69
Netherlands	563	1471
UK	215	569
Total	3830	7657

Source: *Synopsis of the Work of the Court of Justice*

However, conclusions based solely on the total number of preliminary references or the number of EC legal questions might reflect a statistical artifact. Disparities in these totals could possibly be explained by structural differences, between common law and civil law legal systems, for example, or between adversarial and inquisitorial legal systems. These structural features vary amongst European judicial systems. Combining the previous two tables provides the most revealing measure of judicial co-operation. The following table summarises the *proportion* of EC legal questions referred by each member state.



**FIGURE 3. PROPORTION OF EC LAW QUESTIONS REFERRED TO THE ECJ**

	<u>1972-1983</u>	<u>1984-1993</u>
Belgium	21% (116/557)	28% (173/622)
Denmark	44% (14/32)	54% (34/63)
France	31% (163/525)	28% (286/1496)
Germany	26% (371/1429)	29% (416/2205)
Ireland	50% (11/22)	38% (19/88)
Italy	29% (132/452)	16% (176/1074)
Luxembourg	20% (7/35)	30% (21/69)
Netherlands	31% (173/563)	14% (200/1471)
United Kingdom	20% (42/215)	21% (120/569)
Total	27% (1029/3830)	19% (1445/7657)

These numbers capture several trends in British judicial behaviour and confirm preliminary observations based on Figures 1 and 2. Until the early 1980s, British judges were significantly less inclined to make preliminary references to the ECJ than were judges in other member states, referring in only 20% of cases, compared with an EC average of 27%. In fact, along with courts in Luxembourg and Belgium, British courts demonstrated the lowest level of judicial co-operation with the ECJ during the period 1972-1983.

A different picture of judicial co-operation emerged during the 1980s. The proportion of EC legal questions referred by British judges remained basically constant from 1984-1993, a period when, for whatever reasons, courts in several other large member states drastically curtailed the proportion of cases they referred to the ECJ and the average refereeal rate fell from 27 percent to 19 percent. During this period, British courts referred to the ECJ in 21% of cases dealing with EC law, which more than equalled the average level of judicial co-operation throughout the Community and far surpassed levels found in Italy and the Netherlands. The stability in the UK referral rate during this period of relative national judicial insularity appears to support the prediction made earlier in this paper that the post-*Bulmer* period would bring more frequent referrals by

British judges, as *ApS Samex* altered the behaviour of British judges and their exercise of discretion under Article 177.

The traditional model of judicial co-operation fails to account for such national disparities in the number of cases dealing with EC law, the number of Article 177 references, or the proportion of cases referred to the ECJ. As mentioned at the beginning of this paper, the traditional model holds that the number of references is a crucial indicator of the partnership between national courts and the ECJ. At no point does the model predict that the extent of this partnership will vary so considerably amongst member states. This alone is a significant finding which warrants reconsideration of the model. In an attempt to uncover some of the variables which might refine the model and provide a more complete explanation for judicial behaviour, the following section examines a series of British cases in the field of environmental protection which each contained questions of Community law. The behaviour of British judges in these cases highlights the political significance of judicial discretion as well as the variety of competing pressures which any model must consider.<sup>41</sup>

### EC environmental cases in British courts

Despite the rapid expansion of EC environmental policy since its inception in 1972, there has been only a small handful of British cases dealing with EC environmental law, and only in very recent years. In these few instances, British judges have consistently invoked the *acte clair* doctrine and interpreted environmental directives themselves.

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<sup>41</sup>Other authors have looked at UK courts handling of *remedies* in some of these cases but not the propensity of judges to make preliminary references. See Angela Ward, "The Right to an Effective Remedy in European Law and Environmental Protection: A Case Study of United Kingdom judicial Decisions Concerning the Environmental Assessment Directive," 5 *Journal of Environmental Law* 221 (1993).



## Noise Pollution

In July 1991, the House of Lords delivered its opinion in *Regina v. London Boroughs Transport Committee*, a case dealing with traffic noise.<sup>42</sup> A night ban on lorry traffic in London had been adopted in order to reduce noise pollution. Exceptions to the ban were granted only for lorries fitted with a special device which silenced their air brakes. EC Directives 71/320 and 70/157 established manufacturing standards for braking devices and sound levels for exhaust systems, each directive specifying that no state might prevent the use of a vehicle on grounds relating to its braking devices, permissible sound level, or exhaust system if the vehicle complied with both directives. The Divisional Court and the Court of Appeal held unanimously that the night ban violated the two EC directives.

The House of Lords examined the night ban and found that lorries were in fact not being prohibited on grounds relating to their braking devices, sound level or exhaust system. Instead, the Lords interpreted the prohibition narrowly, as regulating traffic and protecting the environment by "banning some vehicles which are unnecessarily louder than others."<sup>43</sup> In order to reach this judgement, the Lords characterised both directives as measures having nothing to do with brake noise or traffic regulation.<sup>44</sup> Nevertheless, the EC directives contained the explicit provisions that

No member state may refuse or prohibit the...use of a vehicle on grounds relating to its braking devices if that vehicle is equipped with the braking devices specified [in the Directive].

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<sup>42</sup>[1992] 1 *Common Market Law Reports* 5. [Brake Noise Case]

<sup>43</sup>*Ibid.*, p. 16.

<sup>44</sup>"The Brake Directive has got nothing to do with sound levels and is not concerned with traffic regulation" (*Ibid.*, p. 14). "The Sound Level Directive does not deal with the sound of compressed air brakes and is not concerned with traffic regulation" (*Ibid.*, p. 15).

No member state may, on grounds relating to the permissible sound level and the exhaust system, refuse the...use of any vehicle in which the sound level and the exhaust system satisfy [the Directive].

The Lords held that vehicle noise was calculated without any regard to brake noise, and therefore the prohibition on lorries was a matter of traffic regulation not covered by the directive. Furthermore, the Lords contended that no one reading the Brake Directive would be made aware that air brakes produced any noise at all, and that the directive therefore did not invalidate the lorry ban.

The Lords might have referred the case to the ECJ for a preliminary ruling on the interpretation of the two directives. The likelihood of a referral was increased by the fact that the House of Lords is a court of final instance from which there is no appeal. ECJ doctrine specifies that such courts have a greater obligation to refer matters to the Court than do lower national tribunals. In the event, the Lords chose not to refer the matter to the ECJ, ruling instead that

The difference between traffic control in urban residential areas for environmental purposes and the Community unification of manufacturing standards for motor vehicles is so obvious that regulation of the former can be held not to infringe the latter without a necessary question of Community law arising (even if a unanimous Court of Appeal has held the opposite) and consequently a compulsory reference under Article 177 (3) EEC is not required.<sup>45</sup>

The lower courts did not refer the case to the ECJ but interpreted ECJ precedent and EC laws themselves to arrive at a decision. The Lords decision criticised their interpretation of EC law.

Since the Court of Appeal did not appreciate the fundamental distinction between the control of vehicles and the regulation of local traffic I do not attach significance to their decision on

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<sup>45</sup>Ibid., p. 6.



Community law...No plausible grounds have been advanced for a reference to the European Court of Justice.<sup>46</sup>

The Brake Noise Case presents an example of British courts applying the *acte clair* doctrine to interpret EC law in favour of environmental protection.

One important pressure operating on the Lords might have been a desire to uphold traditional British environmental interests. The inclination to reduce noise pollution has been a consistent feature of British environmental policy, and represents one of the few areas where the UK can be called progressive. Directive 70/157, the Sound Level Directive under consideration in the case, was adopted before Britain had joined the Community, but actually allowed relaxation of British standards for lorry noise because existing UK noise regulations were more stringent than the directive. In addition, the British official at UKREP responsible for negotiating environmental directives from 1984-89, cited British pressure as the primary force behind the motor cycle noise directive, and claimed that reducing noise pollution has always been a significant British objective.<sup>47</sup> For example, Britain was the only EC member to develop a prototype of a quiet heavy vehicle in the early 1970s.<sup>48</sup>

There have also been three recent cases where the effect of British judges refusing to make preliminary references to the ECJ has been to restrict environmental protection. Each case dealt with the 1985 Environmental Impact Assessment Directive. The political significance of this directive is enormous. It could potentially restrict major national development projects, amounting to millions of pounds, as well as impose environmental restrictions on transport policy, agricultural policy and energy policy.

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<sup>46</sup>Brake Noise Case, p. 21.

<sup>47</sup>Interview, 15 January 1993.

<sup>48</sup>See Nigel Haigh, *EEC Environmental Policy and Britain* (London, Institute for European Environmental Policy, 1989), p. 327.

### *Planning Authority Discretion*

In the 1990 case of *Swale*, the High Court considered whether the Medways Port Authority should have been granted permission to reclaim a 250 acre mudflat which was important to migrating birds, without having undertaken an environmental impact assessment.<sup>49</sup> The Royal Society for the Protection of Birds challenged the planning permission on the grounds that the reclamation constituted a project with significant environmental effects, which requires environmental impact assessment under the terms of the directive. Mr. Justice Simon Brown refused to overturn the planning permission, finding no violation of EC law. His decision addressed two aspects of local planning authority discretion which might have been referred to the ECJ.

The first act of planning authority discretion would be to classify a development project under Schedule 1, Schedule 2, or outside the bounds of the directive. Schedule 1 projects face mandatory assessment, Schedule 2 projects require assessment only if they are likely to have significant effects on the environment by virtue of their nature, size or location. The directive allows member states some discretion, demanding assessment of Schedule 2 projects only where member states consider that their characteristics so require.

Thus there are two discretionary choices open to the planning authority--whether a project falls under either Schedule, and, assuming it falls under Schedule 2, whether the project is likely to have significant effects on the environment. British legislation to implement the directive allows a case-by-case determination of the likely impacts and predicts that "the number of projects [with significant effects] will be a small proportion of all Schedule 2 projects."<sup>50</sup>

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<sup>49</sup>*R v. Swale ex Parte Royal Society for the Protection of Birds*, 1990 *Crown Office Report* 263.

<sup>50</sup>In addition to the Town and Country Planning Regulations 1988, British implementation has taken the form of Circulars. Circular 15/88 sets out criteria which apply in determining whether a Schedule 2 project requires assessment. The circular makes some use of



In *Swale*, the RSPB contended that the planning authority abused both elements of its initial discretionary decision.

Mr. Justice Brown allowed the Swale Borough Council the widest possible discretion in meeting the requirements of the directive. The High Court held that "on the information before it, the Council was entitled to regard this development as falling outside either Schedule."<sup>51</sup> Even if this had not been the case, and the project had fallen within Schedule 2, Mr. Justice Brown refused to impinge upon the discretion of the planning authority to apply whatever criteria it saw fit to determine significant environmental effects. He ruled that "even if they had categorised it as being *prime facie* within Schedule 2, they could not be faulted for concluding that it would not have a significant environmental effect." This ruling accords with the usual British legal test applied to discretion exercised by administrative bodies, whereby a decision is upheld unless no "reasonable person" could possibly reach such a conclusion. Mr. Justice Brown apparently felt that the environmental sensitivity of a reasonable person was not a matter for reference to the ECJ. Similarly, the High Court chose not to ask the ECJ whether the directive allowed the level of discretion given by UK legislation and Circulars.

A second discretionary decision left to the planning authority when applying criteria for Schedule 2 is the definition of a "project." Clearly the nature and size of a development project depends on how one defines the project. A motorway, for example, might be considered one enormous project requiring assessment, or may be considered the sum of many tiny projects whose individual

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thresholds, but emphasises the importance of a case-by-case determination. See David Anderson, "Environmental Impact Assessment in the United Kingdom," in David Vaughan, ed., *Current Legal Developments: EC Environmental and Planning Law* (London: Butterworth's, 1991).

<sup>51</sup>1990 *Crown Office Report* 263, p. 265.

environmental impact is negligible. Government Circular 15/88 included a numerical threshold which could answer this exact question.

New Roads: environmental assessment may be required for new roads or major road improvements more than 10km in length, or 1km if the road passes through a national park or within 100m of a SSSI, national nature reserve or conservation area.

In *Swale*, Mr. Justice Brown addressed the question of whether planning authorities had unlimited discretion to permit piecemeal development projects, ruling that

in respect of Schedule 2 development, the question whether it would be likely to have significant effects on the environment should not be considered in isolation if in reality it was properly to be regarded as an integral part of an inevitably more substantial development. Otherwise, developers could defeat the objective of the regulations by piecemeal development proposals.<sup>52</sup>

While Mr. Justice Brown clearly recognised that piecemeal development circumvents the goals of the directive, he did not deny that discretion to measure the impact of such projects, and the subsequent ability to grant planning permission, resides with the planning authority and is subject to few, if any, restrictions. Anderson, in his critique of the *Swale* case, interprets the Brown decision as allowing assessment of individual projects quite apart from the larger development contemplated beyond them.<sup>53</sup> Mr. Justice Brown apparently chose not to refer the meaning of "project" to the ECJ in a preliminary reference. By making the interpretation himself, Mr. Justice Brown opened the door to enormous piecemeal development projects immune from environmental assessment.

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<sup>52</sup>*The Times*, 11 April 1990, p. 40

<sup>53</sup>Anderson, "Environmental Impact Assessment," p. 74.



The legitimate discretion of a planning authority was also questioned in the 1991 case of *R v. Poole Borough Council*.<sup>54</sup> The Council did not even consider undertaking an environmental assessment for a housing development, at which point the World Wildlife Fund and the British Herpetological Society sought an injunction. As was the case in *Swale*, the development project could have been classed under Schedule 2, at which point the Council would have had to determine whether it posed significant effects for the environment. Circular 15/88 notes that industrial estates where the area exceeds 50 acres or where there are more than 1,000 dwellings within 200 meters of the site boundaries may require environmental assessment. Not only did the Council not consider the housing estate in question large enough to merit assessment, but they did not even classify the scheme as a benign Schedule 2 project.

Mr. Justice Schiemann ruled that the WWF and the BHS had no legal ability to initiate the EIA process if the Council had, acting upon its discretion, failed to do so. This ruling upholds an even wider discretion for planning authorities than was given in *Swale*. Not only did the Poole Council have the ability to classify a project outside the scope of either Schedule, but they had the power to authorise a development project without even contemplating the applicability of the EC environmental impact directive. Given that the case is distinguishable from *Swale* on these grounds, Mr. Justice Schiemann might have referred the question of discretion to the ECJ. The *Poole* case upheld the practically unfettered discretion of planning authorities without referring the matter to the European Court.

The most striking British example of *acte clair* occurred in the now famous 1990 *Twyford Down* case.<sup>55</sup> In March 1990, the Secretary of State for

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<sup>54</sup>*Land Management and Environmental Law Review* April/May 1991, p. 60.

<sup>55</sup>*Twyford Parish Council v. Secretary of State for the Environment* [1992] 1 *Common Market Law Reports* 276. [Twyford Down Case]

Transport proposed a scheme to construct a motorway which would cut through Twyford Down. Three parish councils questioned the validity of the scheme and applied to the court to quash the project on grounds that the Secretary of State for Transport failed to make an environmental impact assessment of the project and to give the public an opportunity to express an opinion thereon.

The central contention presented by the parish councils was that the directive applied to projects which had been published but not yet initiated by the date the directive took force. Such projects might conveniently be regarded as being "in the pipeline." Mr. Justice McCullough recognised that the question before the court was a matter of interpreting EC law:

The answer to the question of whether or not pipeline projects were intended to be covered by the directive is not to be found by balancing the advantages and disadvantages of one construction or the other or by considering the possible, or even the practicable. The essential question is: what was the result which [Directive] 85/337 required to be achieved by 3 July 1988, and the answer must come from the terms of the directive itself.<sup>56</sup>

Nevertheless, he refused to refer the question to the ECJ, the obvious arbiter for interpretation of EC law. Mr. Justice McCullough stated the compelling reason to refer the case--uniformity of EC law--but chose to jeopardise uniformity by withholding a reference.

National judges must remember that the interpretation of Community legislation is all too apt to involve difficulties of which they may be unaware. A provision cannot be interpreted differently in different member states. *Nevertheless I have decided to try to answer it.* <sup>57</sup>

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<sup>56</sup>Twyford Down Case, p. 284.

<sup>57</sup>Ibid. (emphasis added)



After dismissing the importance of a definitive ECJ ruling, he held that the directive did not apply to pipeline projects because such projects were not explicitly mentioned in the directive.

Certainly the text of the directive allows such an interpretation, and Mr. Justice McCullough recounted numerous provisions which might demonstrate that once an assessment has been partially completed under national rules it would be cumbersome to reassess the entire project under EC guidelines. Of course there is no explicit statement in the directive that a cumbersome reassessment is *not* required, nor are there guidelines by which a national court might measure the actual burden, if any, of reassessment. Mr. Justice McCullough played up the fear of cumbersome reassessment as if substantial technical detail would have to be re-examined. In fact, initial stages of assessment may have involved very little effort on the part of the developer, as Mr. Justice McCullough admits.<sup>58</sup> Several possible preliminary references might have been made in this case, but Mr. Justice McCullough chose to interpret the directive narrowly, maximising the discretion of developers and planning authorities.

In fact, British interpretation of the EIA--granting almost unlimited discretion to planning authorities and ignoring pipeline projects--has already been challenged by the Commission. In October 1991, the Commission demanded that Britain halt several development projects on the grounds that inadequate environmental assessment had been applied.<sup>59</sup> Although the Commission explicitly indicted the Government and not the British courts, the broad national discretion which constituted the violation of the EIA was as much a product of British judicial interpretation as legislative intent. UK legislation might have

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<sup>58</sup>Ibid., p. 277.

<sup>59</sup>The *Daily Telegraph*, 18 October 1991; The *Independent*, 19 October 1991; The *Guardian*, 19 October 1991.

been interpreted in several different ways, only one of which condoned the broad discretion of planning authorities and exempted pipeline projects.

The decision by British judges to withhold references from the ECJ in cases where the discretion of planning authority was involved might reflect domestic political objectives similar to those in noise pollution cases. Whereas in noise pollution cases preliminary references might have allowed the ECJ to interpret EC law contrary to stringent British standards, in the planning authority cases an ECJ preliminary ruling could possibly result in much stricter environmental assessment than that found in British practice. During the 1980s, deregulation of development projects was a primary objective of the British Government, reflecting Thatcher's free-market ideology.<sup>60</sup> Throughout the development of the EIA directive, Britain resisted what it saw as unnecessary environmental regulation, securing several amendments to the final version of the directive which accorded with perceived British interests.<sup>61</sup> Thus it is not entirely surprising that British judges exercised their discretion in a manner consistent with British hostility towards regulation, as opposed to allowing the ECJ to tighten regulations through a series of preliminary rulings.

### **Towards a refined model of judicial co-operation**

The traditional model of judicial co-operation advanced by Weiler and others holds that national courts work closely with the ECJ in order to foster European integration. The model postulates that judicial empowerment provides the

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<sup>60</sup>See Philip Lowe and Andrew Flynn, "Environmental Politics and Policy in the 1980s," in John Mohan, ed., *The Political Geography of Contemporary Britain* (Basingstoke: Macmillan, 1989); Andrew Blowers, "Transition or Transformation?—Environmental Policy Under Thatcher," 65 *Public Administration* 277 (1987).

<sup>61</sup>See William Sheate and Richard Macrory, "Agriculture and the EC Environmental Assessment Directive: Lessons for Community Policy-Making," 28 *Journal of Common Market Studies* 68 (1989); Nigel Haigh, "Environmental Assessment—The EC Directive," 1987 *Journal of Planning and Environment* 4.



incentive for such co-operation. For the most part, evidence from the tables in section three which summarise the pattern of references from British courts does not accord with the predictions made by proponents of the traditional model.

From the moment Britain entered the Community, the number of preliminary references originating from British courts lagged far behind that from other member states. Thus judicial empowerment appears to have played little or no part in encouraging wide or enthusiastic use of Article 177 by British judges. While authors have also found that British courts were generally not co-operative with the ECJ prior to the mid-1980s, their conclusions were based on analysis of sympathetic interpretation as an indicator of co-operation rather than isolating the overall referral rate.<sup>62</sup>

Just as the traditional model fails to explain British judicial activity from 1972-1983, it also fails to account for changing patterns of judicial behaviour in subsequent years. According to the statistics for the period 1984-1992, which occurred after the seminal *ApS Samex* ruling, British judges did in fact make relatively more preliminary references than before, and referred a higher proportion of the cases involving EC law. Each of these developments indicate a greater propensity to engage in judicial co-operation with the ECJ.<sup>63</sup> Nevertheless, the substantial gap between British referrals and foreign referrals, although slightly smaller than in previous years, still remained. Moreover, similar disparities remained between Britain and other member states regarding

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<sup>62</sup>See Volcansek (1986).

<sup>63</sup>This change of attitude is reflected in the literature. Writing in 1983, observers claimed that British judges had refused to embrace ECJ doctrine and methods. By 1991, however, this sceptical view of British courts had been revised after a steady progression of cases which acknowledged the authority of the ECJ and of EC law. Compare D.N. Clarke and B.E. Sufrin, "Constitutional Conundrums. The Impact of the United Kingdom's Membership of the Communities on Constitutional Theory," in M.P. Furmston et al., eds., *The Effect on English Domestic Law of Membership of the European Communities and of Ratification of the European Convention on Human Rights* (Boston: M. Nijhoff, 1983) and Paul Craig, "UK Sovereignty after Factortame," 11 *Yearbook of European Law* 221 (1991).

the number of EC legal questions arising in national courts. Thus if one takes all the indicators together, at no point has British judicial co-operation with the ECJ reached the same level as that found in other large member states. This finding contrasts sharply with other studies which conclude that British courts "demonstrated whole-hearted compliance with the obligations imposed by Article 177 of the Treaty."<sup>64</sup>

The traditional model also fails to account for evidence at the microlevel drawn from the environmental sector. Given the slight upturn in the total number of British preliminary references, the evidence seems to show that British resistance to preliminary references is stronger in environmental cases than in general. All the environmental cases discussed above occurred after Lord Bingham's decision in *ApS Samex* which encouraged British judges to make more referrals than they would have done under Lord Denning's previous ruling in *Bulmer*. Nevertheless, British courts show no inclination whatsoever to refer environmental cases to the ECJ for preliminary rulings, which raises the interesting question whether the tendency of British judges to interpret EC law themselves is particularly strong in environmental cases, and indicates the need to refine the model in order to explain cases in individual policy sectors. There has not yet been an attempt to conduct an examination of British 177 references in other policy sectors. Rather, authors analyse only a scattering of cases where Article 177 might have been used. Two sectors of particular interest might be sex discrimination and Sunday trading. In addition, recent analysis has focused almost exclusively on sympathetic interpretation of national laws and the rights of British citizens to effective remedy for breach of EC law. The remainder of this paper will suggest a variety of factors which might help illuminate British judicial activity. A number of these factors could serve to refine the traditional model of judicial co-operation.

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<sup>64</sup>Volcansek (1986) at 219.



One factor which might explain disparities between the number of national preliminary references is national political culture and the expected role of the courts. It might be the case that British judges viewed empowerment as an illegitimate deviation from their traditional role within the UK constitutional system which emphasises Parliamentary supremacy and limited judicial review. With a traditional deference to representative branches of government, British judges might not have recognised the opportunity for empowerment until recently, or may have seen such empowerment as inappropriate.

Another relevant aspect of political culture might be that the inclination of British judges to exercise their *acte clair* discretion more than foreign judges stems from a general hostility to the "new legal order"; in essence, a further example of British resistance to Community integration. The figures above support other accounts of "strategic" use of *acte clair* by British courts.<sup>65</sup> In line with this possibility, evidence that British courts fail to apply EC directives and treat claims of UK non-compliance with hostility was presented to the House of Lords in 1991.<sup>66</sup> It was mentioned in section one that strategic use of judicial discretion could take the form of withholding references, or alternatively, flooding the Court with references in order to influence the direction of EC legal development, as was the practice of German and French courts in the early years of the Community. If Euro-scepticism has been a factor in British co-operation with the ECJ, the pattern has been to strategically withhold references rather than attempt to alter the course of integration through frequent referrals.

The slight increase in the number of British preliminary references since *ApS Samex* might reflect a lifting of Euro-scepticism in recent years within judicial ranks. Since the late 1980s British courts have demonstrated greater willingness

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<sup>65</sup>Arnall, "The Use and Abuse," p. 631-637.

<sup>66</sup>House of Lords Select Committee on the EC, Ninth Report (1991-92).

to embrace the direct effect and primacy of EC law.<sup>67</sup> This raises the interesting possibility that British courts moved gradually towards greater judicial co-operation with the ECJ despite a general political climate of Euro-pessimism--it should not be forgotten that during the 1980s the Government treated European integration with open hostility. Alternatively, the fact that the level of British judicial co-operation, measured by the total number of questions involving EC law or the total number of preliminary references, continued to lag behind the level of judicial co-operation in other member states might reflect a connection between the general political climate and the attitude of British judges.

That political culture shapes the interaction between British courts and the ECJ is not entirely surprising. A similar politicisation of interaction is clearly evident in the Government's active involvement in ECJ cases. Community legal procedure allows any member state to submit written or oral arguments whenever the member state so desires. This applies to domestic as well as foreign Article 177 references. The following table summarises the total number of observations made by member states in both domestic and foreign Article 177 cases.

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<sup>67</sup>See *Litster v. Forth Dry Dock and Engineering Co Ltd* [1989] *Common Market law Review* 194; *Pickstone v Freemans plc* [1989] AC 66; *Factortame Ltd v Secretary of State for Transport* [1990] 2 AC 85; *Factortame Ltd v Secretary of State for Transport (No. 2)* [1991] *All England Law Reports* 70. See Paul Craig, "Sovereignty of the United Kingdom Parliament after *Factortame*," 11 *Yearbook of European Law* 239 (1991).



**FIGURE 4. ARTICLE 177 JUDGEMENTS AND GOVERNMENT OBSERVATIONS: 1973-1992**

	Domestic Cases			Foreign Cases		
	References	Observations	O/R (%)	References	Observations	O/R (%)
Belgium	192	61	32	1388	39	3
Denmark	33	17	52	1547	70	5
Germany	539	136	25	1041	107	10
Greece	9	4	44	1571	19	1
France	239	141	59	1341	120	9
Ireland	23	10	43	1557	24	2
Italy	163	125	77	1417	184	13
Luxembourg	19	12	63	1561	6	<1
Netherlands	245	146	60	1335	73	5
Spain	10	6	60	1570	29	2
Portugal	4	4	100	1576	17	1
UK	104	88	85	1476	213	14
Total	1580	750	47	17380	901	5

Example: Of the 1580 Article 177 judgements given by the ECJ during 1973-1992, 104 originated in British courts. The British government submitted observations in 88 out of these 104 cases--85% of the time. Of the 1476 Article 177 judgements which originated in foreign courts, the British government submitted observations in 213--14% of the time.

Source: European Court of Justice, Legal Data Processing Service

The attitude of the Government is clearly identifiable. The percentage of references where the Government filed observations is significantly higher than average, exceeding all other member states except Portugal, where the number of cases arising was almost negligible. In foreign cases, Britain has proven more willing than any other member state to try to influence the ECJ. From 1973-1992 there were a total of 1476 references which originated from courts outside the UK. Britain intervened in 213 of these cases, far exceeding the number of observations made by any other member state.<sup>68</sup> Clearly the Government is

<sup>68</sup>Everling concludes that "the figures thus reveal a trend for precisely those member states which are wary of supranational concepts to take part frequently in preliminary ruling cases even where their direct interests are not affected." See Ulrich Everling, "The Member

sensitive to the significance of Article 177 references, and takes every opportunity to influence their outcome.<sup>69</sup> The above figures attest to the interventionist attitude which clearly prevails with those responsible for submitting observations.<sup>70</sup>

The Government's decision to frequently intervene highlights the second of the two approaches to discretion mentioned in section one--that resistance to EC integration and the new legal order does not necessarily entail a minimal level of interaction between national and Community institutions. Rather than avoid interaction, the Government showed extreme sensitivity to the power wielded by the ECJ and sought to influence its rulings by frequently intervening in Article 177 cases.

In addition to the political pressures discussed above, another factor which could refine the existing model of judicial co-operation is the possibility that British judges are frustrated with replies they have received from the ECJ in previous preliminary references. Toth observes that "English courts and tribunals are (perhaps justifiably) disappointed with some of the preliminary rulings they received in the equal pay and equal treatment cases."<sup>71</sup> He recommends that

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States of the European Community Before Their Court of Justice," 9 *European Law Review* 215 (1984), p. 225.

<sup>69</sup>An Assistant Treasury Solicitor responsible for British written and oral observations to the Court was able to claim in 1985 that "I do not know of a case where we have failed to submit written observations in time in a case where we had decided that we should submit observations." See R.N. Ricks, "Article 177 References: The United Kingdom Experience," in Schermers et al., *Article 177 EEC*, p. 255.

<sup>70</sup>For a contrasting view, see Claus Gulmann, "Methods of Interpretation of the European Court of Justice," *Scandinavian Studies in Law* 187 (1980). Writing in 1980, Gulmann, Legal Secretary to the ECJ from 1973-76, claimed that observations were not used strategically to influence the Court.

<sup>71</sup>*Article 177 EEC*, p. 398.



surely the answer lies not in refraining from referring similar future cases but, on the contrary, in referring and referring again, until the Court is made aware of the existence of a real problem and is virtually forced to give a relevant answer.<sup>72</sup>

This advice, reminiscent of French and German judicial activity in the early days of the Community, overlooks the ramifications of consistently adverse ECJ rulings which contribute weight to Court precedent. Losing a long string of ECJ cases merely allows the Court to construct an increasingly impenetrable wall of precedent, and facilitates other member states invoking the *acte clair* doctrine to disseminate similar interpretations at the national level. Exercising their discretion under Article 177 and *acte clair*, British judges have withheld references from the Court which might have become ammunition for additional adverse rulings. In a sense, interpreting EC law themselves instead of facing the prospect of frequent frustration at the hands of the ECJ achieves a form of empowerment which the traditional model overlooks. Instead of empowering the judicial branch against other Community institutions and national governments, British judges empower *themselves* by withholding references from the supranational Court. The ECJ's recent move to curtail its enormous case load by accepting fewer preliminary references from national courts will provide even greater scope for British judges to exercise strategic use of Article 177.<sup>73</sup>

Finally, domestic political pressure may operate differently in each policy sector. The examples of environmental policy cases show a reluctance to refer to the ECJ despite the general post-1983 trend of more frequent references. This reluctance accords with British policies in the field of noise pollution and environmental impact assessment. It remains to be seen in which other policy sectors British courts have adopted a similarly uncooperative position.

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<sup>72</sup>Ibid.

<sup>73</sup>For a discussion of the Court's efforts to control its docket, see Anthony Arnall, "Judging The New Europe," *19 European Law Review* 3 (1994).

## Conclusions

This paper has attempted to test the traditional model of judicial co-operation against empirical evidence drawn from British judicial activity since its accession to the Community in 1972. The traditional model, supported by Weiler, Burley, Mancini, Shapiro and a number of others, maintains that the ECJ requires preliminary references from national courts in order to advance European integration. The model posits that self-interest propels national judges eagerly to make referrals—frequent referrals empower the judicial branch against other Community institutions and national governments, and involve national judges in the "heady" business of gaining *de facto* judicial review over their national legislatures. It has been argued here that the model fails to account for the pattern of preliminary references from British courts. It also fails to explain the behaviour of British judges in cases dealing with specific policy sectors such as environmental protection.

The traditional model assumes that judicial empowerment will affect courts in each member state equally, making no allowances for national constitutional traditions or national political pressures. This study has shown that empirical evidence does not support such assumptions. Rather, judicial co-operation varies significantly amongst the member states. National disparities are evident in the number of national cases involving questions of EC law, in the number of preliminary references made by courts in each member state, and in the proportion of cases involving EC law which national courts referred to the ECJ. In the British case, questions of EC law and preliminary references arise far less frequently than in other member states. Furthermore, until the middle of the 1980s, British courts distinguished themselves for their propensity to decide questions of EC law themselves instead of referring them to the ECJ. The conclusion which emerges most clearly from this study is that analysis must focus on judicial co-operation in individual member states, and on co-operation



within individual policy sectors. Claims about general judicial self-interest fail to discriminate between radically different national situations and should therefore be treated with caution.

This paper has offered several tentative suggestions on where future analysis of judicial co-operation might concentrate. First, national traditions and political pressures help explain the glaring disparities amongst member states. Judicial empowerment plays a greatly reduced role in Britain, where judicial review contrasts sharply with the constitutional tradition of parliamentary supremacy. Additionally, British courts operate within a general climate of Euro-pessimism, an attitude which might be shared by the judges themselves. Each of these factors militate against strengthening European integration and the ECJ through active judicial co-operation. The frustration experienced by British judges when receiving adverse rulings in previous preliminary references also contributes to their lack of judicial co-operation.

In the second half of the 1980s, British courts displayed a relatively higher level of judicial co-operation. Changing domestic pressures help explain why British judges referred a greater proportion of cases to the ECJ during this period. Perhaps the primary factor was the 1983 ruling by the House of Lords which encouraged more frequent referrals. This ruling was followed by several other British judicial decisions which embraced EC law at the expense of Parliamentary sovereignty. These rulings were made despite a general British political climate hostile to greater European integration. This raises the question whether or not, on the whole, the discretion of British judges under Article 177 is unaffected by external political factors. While this paper offers some evidence of this independence, it also reveals several measures of judicial co-operation which point to the opposite conclusion.

In addition to some of the quantitative evidence, experience from the environmental cases also demonstrates the need to refine the existing model to reflect domestic considerations. British judges have refused to refer questions of

EC environmental law to the ECJ, even during recent years of greater judicial co-operation. Domestic factors may explain this apparent anachronism. In the case involving noise pollution, failure to refer to the ECJ allowed British judges to uphold stringent standards, in line with Britain's traditional concern for limiting noise pollution. In the series of cases involving environmental assessment of planning projects, refusal of British judges to refer questions to the ECJ allowed them to maintain the practically unfettered discretion of British planning authorities. This result accords with Britain's policy of deregulation, and its resistance to the EC Environmental Impact Assessment Directive. In each of these environmental cases, empowering the ECJ conflicted with domestic political pressures. Refusal to refer limited the Court's ability to foster European integration, but empowered individual judges through their ability to protect British environmental traditions. The British environmental cases indicate that any refinement to the existing model of judicial co-operation should draw upon experience from individual policy sectors.





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